Supreme Court, U.S.
FILED

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No. _____

In The

Supreme Court of the United States

NEW PRIME d/b/a PRIME, INC. and
SUCCESS LEASING, INC.,

Petitioners,

vs.

OWNER OPERATORS INDEPENDENT DRIVERS
ASSOCIATION, INC., ET AL.,

Respondents.

**On Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Eighth Circuit**

PETITION FOR WRIT OF CERTIORARI

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January 11, 2000

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QUESTION PRESENTED

When Congress passed the ICC Termination Act of 1995, and expressly provided for judicial enforcement of agency "orders," did it thereby intend to create a private right of action to enforce not just orders, but also regulations promulgated by the federal agencies that inherited the ICC's enforcement authority?

PARTIES

The caption of this case contains the names of all parties. Petitioners New Prime, Inc. d/b/a Prime, Inc. and Success Leasing, Inc. have no parent or subsidiary companies.

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PETITION FOR WRIT OF CERTIORARI

New Prime, Inc. d/b/a Prime, Inc. and Success Leasing, Inc. respectfully pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Eighth Circuit entered in this proceeding on August 10, 1999.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Eighth Circuit that gives rise to this petition is reported at 192 F.3d 778, and is reprinted in Appendix A hereto ("App. A") at pages 1a-17a. The opinion of the United States District Court for the Western District of Missouri dismissing respondents' complaint is unpublished, and is reprinted as Appendix B, App. 18a-23a.

JURISDICTION

The judgment of the Eighth Circuit sought to be reviewed was entered on August 10, 1999. Because the government was a party to a case consolidated for oral argument in the court of appeals, the petition for rehearing was not due for 45 days, or until September 24, 1999, under Fed. R. App. P. 40(a). Petitioners timely filed a petition for rehearing and a petition for rehearing en banc on September 23, 1999, which were denied on October 13,

1999. App. 31a. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTES INVOLVED

At issue in this case are §§ 14701 through 14705 of Title 49 U.S.C. These sections are reprinted as Appendix E, App. 32a-39a.

STATEMENT OF THE CASE

A. Background

The ICC Termination Act of 1995[1] ("ICCTA") disbanded the Interstate Commerce Commission and transferred some of its former responsibilities, including those at issue in this case, to the Department of Transportation and the Federal Highway Administration ("FHWA"). Although the ICC had routinely determined private trucking disputes involving its regulations when it was in existence, the current practice after its termination is unsettled. While petitioners believe the ICC Termination Act requires a party seeking damages for an alleged violation of an FHWA regulation to apply in the first instance to the agency and obtain an agency order, the Eighth Circuit did not agree. It held, in a case of first impression in the courts of appeals, that an aggrieved

[1] Pub. L. 104-88, 109 Stat. 804 (codified as amended in scattered sections of 49 U.S.C.).

party may sue directly in federal court for money damages not only when agency orders are violated, but when agency regulations are as well. In so holding, the court of appeals candidly acknowledged that it was "rather mystified" by the "inconsistent language" chosen by Congress to purportedly authorize this result. App. 13a.

B. Proceedings Below

The respondent Owner Operator Independent Drivers Association, Inc. ("OOIDA") filed this case in the United States District Court for the Western District of Missouri to enforce its view of certain "truth in leasing" regulations promulgated by the FHWA. Jurisdiction was alleged under 28 U.S.C. §§ 1331 and 1367(a) as well as 49 U.S.C. §§ 14102 and 14704. OOIDA sought money damages based on its belief that petitioners' handling of escrow funds did not comply with certain FHWA regulations. OOIDA did not first seek an order from the FHWA interpreting these regulations.

Petitioners moved to dismiss the complaint, arguing that the FHWA had primary jurisdiction over OOIDA's complaint. Petitioners also raised the alternative argument that the agency's jurisdiction over matters pertaining to its regulations was, in the absence of a formal agency order, exclusive, because Congress did not create a private right of action in federal court for perceived violations of FHWA regulations as opposed to agency orders.

The district court dismissed OOIDA's complaint on the ground of primary jurisdiction, App. 23a, and OOIDA appealed. While the case was on appeal, OOIDA applied

ex parte to the FHWA for a determination that the agency would not exercise jurisdiction over the present dispute. App. 40a-53a. Even though the district court had determined that the FHWA had primary jurisdiction, the agency agreed with OOIDA's *ex parte* request, and refused to exercise its jurisdiction in a decision entered May 29, 1998. App. C, App. 24a-30a. New Prime's petition for review from that agency decision was consolidated for appeal below, along with a substantially identical appeal and petition for review that were transferred from the United States Court of Appeals for the Sixth Circuit. App. 5a.

On appeal, the Eighth Circuit reversed the district court's holding on primary jurisdiction. App. 15a-16a. It also held that the FHWA did not have exclusive jurisdiction to interpret its own regulations. App. 14a. Although the court of appeals agreed that no agency "order" had issued in this case (App. 10a-11a), and that the ICC Termination Act of 1995 expressly provided for federal court jurisdiction only where such "orders" had issued (*id.*), it nevertheless held that other provisions of the ICC Termination Act granted a private right of action to enforce agency regulations in federal court. App. 11a-14a.

REASONS FOR GRANTING THE WRIT

The Court should hear this case because it concerns basic – and still unsettled – issues about how agency regulations governing vital nationwide industries like trucking and railroads are to be enforced now that the

ICC has been terminated. It also raises troubling questions about the length to which federal courts should go to find subject matter jurisdiction where Congress has failed to expressly grant it. The court of appeals below, in a decision that conflicts with at least three other lower federal courts, has held that the ICC Termination Act of 1995 significantly expands federal court jurisdiction by allowing private parties to obtain direct review and enforcement not just of agency orders, but also of thousands of agency regulations, even though the Act never explicitly says this. Finally, this case presents a clash of views between the administrative agency, which maintains that generally it is not obligated to hear any private disputes over its own regulations (App. 28a), and the views of at least three federal courts, which believe the agency has primary, if not exclusive, jurisdiction over these same claims.

I. The Court Should Consider Whether Congress's Enactment of the ICC Termination Act of 1995 Expanded Federal Court Jurisdiction To Allow Private Parties To Recover Money Damages For Violations of Agency Regulations.

A. The Express Language of The Act Limits Federal Court Jurisdiction to Review of an Agency "Order," Something The Court of Appeals Acknowledged Was Never Entered Here.

The ICC Termination Act very clearly limits private causes of action to review of agency "orders." *See* 49 U.S.C. § 14704(a)(1) ("A person injured because a carrier . . . does not obey an *order* of the Secretary or the Board, as applicable, under this part, . . . may bring a civil action

to enforce that *order*. . . . ") (App. 34a) (emphasis added). The court of appeals correctly recognized that this language – the only relevant statutory provision to directly address subject matter jurisdiction – was *not* sufficient to create a private right of action in the present case, where the plaintiffs are not challenging an agency order, but are claiming a violation of an agency regulation. *See* App. 10a. ("[W]e cannot ignore the plain language limiting the private right of action created by the first sentence of § 14704(a)(1) to suits to enforce agency orders."). But the Eighth Circuit inexplicably went on to read the second sentence of § 14704(a)(1), or alternatively § 14704(a)(2), to create just such a private right of action. As explained below, however, those sections do not grant a right to sue at all. Rather, they confer on a party *otherwise entitled to sue to enforce an agency order* the right to obtain both injunctive relief and money damages as part of such an otherwise-authorized suit.

The enforcement scheme of the Act gives the FHWA exclusive jurisdiction over the enforcement of its regulations. The FHWA is given authority to promulgate regulations governing the trucking industry in 49 U.S.C. § 13301(a). It has responded by passing thousands of regulations set out in 49 C.F.R. The Act gives the FHWA the specific authority to bring a civil action "to enforce this part, or *a regulation* or order of the secretary or Board, as applicable, when violated by a carrier. . . . " 49 U.S.C. § 14702 (App. 33a) (emphasis added). Thus the Act specifically gives the *agency* the authority to file civil actions to enforce "regulations." No such express authority is given to private litigants.

The lower courts are confused about whether federal court jurisdiction exists to enforce agency regulations under the ICC Termination Act. The Eighth Circuit's current reading of the Act is at odds with at least three lower federal court opinions. In fact, in an earlier decision of its own, *DeBruce Grain, Inc. v. Union Pacific R.R.*, 149 F.3d 787, 788 (8th Cir. 1998), the Eighth Circuit discussed the parallel provision of the Act pertaining to rail carriers (49 U.S.C. § 11704) and did not find that any private right of action to enforce agency regulations existed. It instead limited its discussion of remedies to the enforcement of agency orders and excess tariff claims:

> In 1995 Congress passed the Interstate Commerce Commission Termination Act under which the STB replaced the Interstate Commerce Commission (ICC) as the regulatory agency for rail transportation. 49 U.S.C. § 702. Application can be made to the STB by disappointed shippers for emergency orders similar to injunctions, 49 U.S.C. § 721(b)(4), and for damages, 49 U.S.C. § 11704. * * * *Federal court jurisdiction exists over claims for violations of STB orders* and for charges that are in excess of the applicable rate. 49 U.S.C. § 11704.

Id. at 788 (emphasis added).

The district court in *DeBruce* had reached the same conclusion. It held, in a part of its opinion not reached or discussed by the Eighth Circuit, that the parallel rail provision of the ICC Termination Act (49 U.S.C. § 11704) did not authorize private actions to enforce agency regulations. *DeBruce Grain, Inc., v. Union Pacific R.R.*, 983

F. Supp. 1280, 1284 (W.D. Mo. 1997), *aff'd on other grounds*, 149 F.3d 787 (8th Cir. 1998).[2]

The ICCTA provision construed by the district court and Eighth Circuit in *DeBruce* (49 U.S.C. § 11704) is substantially identical to the provision construed by the Eighth Circuit in the present case. 49 U.S.C. § 14704.[3] They should be construed identically. Section 14704, like Section 11704, authorizes federal civil actions only in connection with tariff questions and to enforce agency *orders*. It should not be read to authorize the broad

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[2] The Eighth Circuit's opinion in *DeBruce* did not affirm the district court's holding on exclusive jurisdiction. It instead held that the Surface Transportation Board had primary jurisdiction to consider the carrier's claims, and affirmed the dismissal of the private claim on that basis alone. *DeBruce Grain*, 149 F.3d at 789. Thus the Eighth Circuit did not need to reach the issue of exclusive jurisdiction in *DeBruce*. But, as noted above, it nevertheless appeared to characterize the parallel ICCTA rail provision as allowing a private right of action to enforce agency *orders*, not regulations.

[3] The ICCTA governs railroads and motor carriers, among others. The provisions governing enforcement actions involving railroads (49 U.S.C. §§ 11701-11707), which the *DeBruce* courts construed, are largely identical to those governing enforcement actions involving motor carriers (49 U.S.C. §§ 14701-14708). Although § 14704(a) contains a sentence authorizing injunctive relief against motor carriers that does not appear in the parallel railroad provision (§ 11704), the relevant provisions dealing with railroads (§§ 11704 and 11705) are otherwise identical in all material respects to the provisions governing motor carriers that are now at issue (§§ 14704 and 14705). *See Renteria v. K & R Transp. Co.*, Case No. CV98-290MRP (C.D. Cal. February 23, 1999) (reprinted at Appendix G, App. 54a-66a) (stating that rail provisions at issue in *DeBruce* are "identical" to the trucking regulations now at issue) (App. 63a).

jurisdiction to directly enforce agency policy and regulations that the court of appeals first recognized in this case.

The court in *Renteria v. K&R Transportation Co.*, Case No. CV98-290MRP (C.D. Cal. Feb. 23, 1999) (App. G), expressly disagreed with the FHWA's efforts to distance itself from its own regulations, holding that the exact trucking regulations now at issue did *not* authorize a private right of action in federal court to enforce FHWA regulations. App. 66a ("The Court . . . finds that there is no private cause of action under the ICCTA for damages without first obtaining an agency order."). *See also City of Laredo v. Texas Mexican Ry.*, 935 F. Supp. 895, 898 (S.D. Tex. 1996) (reading the parallel ICCTA rail carrier provisions as allowing a party to file suit in federal court "only to enforce an order of the Board, to recover overcharges or to recover under a bill of lading"). In holding that there was no federal jurisdiction for private claims to enforce FHWA regulations, the *Renteria* court expressly noted the FHWA's contrary view, but refused to accord that view any weight, stating: "It is inappropriate for a federal court to expand its jurisdiction in anticipation of agency inaction." *Id.*, slip op. at 10, App. 66a.

This case, which concerns the regulation of vitally important national industries like trucking and rail transportation, presents a question of serious public importance. The Eighth Circuit's decision significantly expands federal court jurisdiction in a way that is at odds with three federal district court opinions as well its own characterization of the ICCTA in *DeBruce Grain*. Under the approach first adopted by the Eighth Circuit in this case, parties will no longer be limited to enforcing orders that the agency itself has first entered, orders that would be

based on the agency's reasoned interpretation of its own myriad regulations. Instead, aggrieved parties will now be able to file federal lawsuits in the first instance to raise claims involving agency regulations and general agency policy. The Court should determine whether this expansion of federal jurisdiction is either necessary or wise.

B. Congress's Failure To Provide A Limitations Statute In The Act for The Cause of Action First Recognized By The Court of Appeals Also Suggests That It Did Not Intend To Create The Private Right of Action First Recognized By The Court of Appeals.

The fact that the court of appeals incorrectly read the Act to expand federal court jurisdiction is shown by a section of the Act the court failed to discuss, 49 U.S.C. § 14705 (App. 37a-38a). That section, which provides limitations periods for every cause of action under the Act,[4] shows that the result reached by the court of

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[4] Section 14705 provides only the following five limitations periods:

> (1) 18 months after accrual for a carrier to recover charges for transportation or services provided by the carrier (49 U.S.C. § 14705(a));
>
> (2) 18 months after accrual for a civil action to recover overcharges from a carrier (49 U.S.C. § 14705 (b));
>
> (3) two years from accrual to file a complaint against a carrier for damages for exceeding the tariff rate under § 14704(b) (49 U.S.C. § 14705(c));
>
> (4) *one year after the date of an order "to enforce an order of the Board or Secretary against a carrier"* (49 U.S.C. § 14705(e));

appeals cannot be what Congress intended. Section 14705, entitled "Limitation on actions by and against carriers," sets out limitations periods for five separate causes of action under the Act. There is no limitations period for the general claim first recognized by the Eighth Circuit on August 10. Instead, § 14705, like § 14704(a)(1), provides specifically that "a person must begin a civil action to enforce an *order* of the Board or Secretary against a carrier within 1 year after the date of the *order*." 49 U.S.C. § 14705(e) (App. 38a) (emphasis added). There is no mention of any limitations period for some general civil action to recover money damages for a violation of agency regulations.

The fact that the relevant limitations provisions in the Act are confined to the enforcement of "orders" shows that the Eighth Circuit erred in reading the injunctive relief provision of § 14704(a)(1) as authorizing a suit for damages for violation of a regulation. Not only is the heading of § 14704(a)(1) plainly entitled "Enforcement of order" (App. 34a), but the fact that § 14705 provides no limitations statute for any relevant violation other than an action to enforce an "order" shows convincingly that the court of appeals has simply found a cause of action where none exists.

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(5) three years for actions relating to transport for the United States Government. (49 U.S.C. § 14705(f)).

App. 37a-38a.

No other limitations periods appear in the Act. There is specifically no limitations period for any kind of civil enforcement action other than the one-year period for enforcing an agency *order* set out in § 14704(e).

The cases that have read the ICCTA to bar private actions to enforce agency regulations have stressed this lack of an applicable limitations period. The district court opinion in *DeBruce Grain*, for example, rejected a party's attempt to enforce an agency regulation, specifically noting the absence of an applicable limitation statute:

> The lack of a limitation period for the type of suit brought by Plaintiff is conspicuous and suggests that when Congress permitted "civil actions" under § 11704(b) (as provided in section 11704(c)), it meant to do so only with respect to an action to recover overcharges. To interpret § 11704(b) as broadly as Plaintiff suggests would leave Plaintiffs with no limitation period, which is an absurd result that Congress could not have intended. As one court recently observed, "a person may file suit in federal court only to enforce an order of the Board, to recover overcharges or to recover under a bill of lading." History supports this statement: Despite the presence of similar statutory language prior to the ICCTA's enactment, no Court has ever entertained a suit premised solely on alleged violations of broad, transportation policy statements.

DeBruce Grain, 983 F. Supp. at 1284 (citation omitted).

The same should be true here. The ICCTA does not authorize a private civil action to enforce an agency regulation. Only the agency may bring such an action. *See* 49 U.S.C. § 14702(a)(2) (specifically authorizing "the Secretary or the Board" to bring a civil action to enforce "a regulation . . . of the Secretary or Board"). A private

party, in contrast, may bring a federal civil action only to enforce "orders." 49 U.S.C. § 14704(a).

The Court in *Renteria v. K&R Transportation, Inc.* relied on this same lack of a limitations statute in holding that the exact provisions now at issue did not authorize the broad private right of action recognized by the Eighth Circuit on August 10:

> The court in *DeBruce* put emphasis on the structure of the applicable statutes of limitations. The Act provides for a limitation period for civil actions to recover overcharges and for civil actions to enforce an order from the Board. See 49 U.S.C. §§ 11705, 14705. There is no provision governing the filing of a civil action for any other types of damages. If other actions for damages were allowed, plaintiffs would appear to have no limitations period, a result the *DeBruce* court dismissed as "absurd." *Id.* at 1284. *This suggests Congress did not intend to permit civil actions for damages for violations of regulations.*

Slip op. at 11 (emphasis added) (App. 64a).

The confusion in the lower courts, the disagreement between several courts and the agency over the scope of the agency's powers, and the importance of these issues to the trucking industry, the railroad industry, and other entities formerly under the ICC's jurisdiction, requires the Court's intervention.

CONCLUSION

The Petition for Writ of Certiorari should be granted.

Respectfully submitted,

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January 11, 2000

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APPENDIX A

United States Court of Appeals
FOR THE EIGHTH CIRCUIT

No. 98-1420

Owner-Operator Independent Drivers Association, Inc., et al., individually and on behalf of all others similarly situated,	*	Appeal from the United States District Court for the Western District of Missouri.
Plaintiffs – Appellants,	*	
v.	*	
New Prime, Inc., et al.,	*	
Defendants – Appellees.	*	

No. 98-2942
No. 98-3143

New Prime, Inc., et al.,	*	
Petitioners,	*	
v.	*	Petitions for Review of an Order of the Federal Highway Administration.
United States of America, Federal Highway Administration, et al.,	*	
Respondents,	*	

No. 98-3478

Arctic Express, Inc., et al., *
*
Petitioners, *
*
v. *
*
Federal Highway *
Administration, et al., *
*
Resondents. *

Submitted: April 23, 1999

Filed: August 10, 1999

Before WOLLMAN* and LOKEN, Circuit Judges, and JACKSON,** District Judge.

LOKEN, Circuit Judge.

The ICC Termination Act of 1995[1] transferred the motor carrier regulatory functions of the Interstate Commerce Commission to the Department of Transportation and the Surface Transportation Board. *See* 49 U.S.C.

* The Honorable ROGER L. WOLLMAN became Chief Judge of the United States Court of Appeals for the Eighth Circuit on April 24, 1999.

** The HONORABLE CAROL E. JACKSON, United States District Judge for the Eastern District of Missouri, sitting by designation.

[1] Pub. L. No. 104-88, 109 Stat. 803 (1995).

§ 13501. Within DOT, the Federal Highway Administration (FHWA) administers and enforces regulations that impose restrictions on lease agreements between motor carriers and owner-operators of truck tractors, commonly known as the "Truth-in-Leasing" regulations. *See* 49 C.F.R. Part 376. A class of owner-operators has sued two motor carriers alleging that certain of their lease provisions violate the regulations. The Western District of Missouri dismissed one suit, deferring to the primary jurisdiction of FHWA. The agency then declined to exercise that jurisdiction. The result is four consolidated appeals in this court raising complex issues of statutory construction. The motor carriers and the American Trucking Association argue that the agency's statutory remedy is exclusive, while the owner-operators and FHWA argue that these private disputes should be resolved in federal court. Rejecting the motor carriers' contention, we reverse the district court's dismissal of the owner-operator claims.

I. Background and Procedural History

Independent owner-operators lease truck equipment and provide driving services to federally registered motor carriers. In Case No. 98-1420, the Owner-Operator Independent Drivers Association and individual owner-operators (the "Owner-Operators") filed a class action complaint against New Prime, Inc., a registered motor carrier, and its affiliate, Success Leasing, Inc. (collectively, "Prime"), alleging that provisions in Prime's standard

lease agreements and equipment rental-purchase contracts violate FWHA leasing regulations and are unconscionable under Missouri law. Briefly stated, the Owner-Operators challenge contract terms governing reserve funds and security deposits as violating 49 C.F.R. §§ 376.12(i) & (k).

The district court dismissed the complaint, concluding that FHWA has primary jurisdiction because the claims involve matters within the agency's expertise. The Owner-Operators then filed the first of our four consolidated appeals, arguing the district court improperly applied the primary jurisdiction doctrine. With that appeal pending, the Owner-Operators filed an *ex parte* Petition for Declaratory Order with FHWA, asking the agency to issue a declaratory order either construing the relevant regulations in their favor, or declaring that the agency does not have primary jurisdiction over their dispute with Prime. FHWA responded with a Notice of Denial, declining to exercise primary jurisdiction because the Truth-in-Leasing regulations and the issues raised by the Owner-Operators "are fairly straightforward matters clearly within the competence of a court to resolve," and because the ICC had addressed similar issues in OPA Information Bulletin No. 93-103, No. MC-C-30192, *Dart Transit Co. – Petition for Declaratory Order*, 9 I.C.C.2d 701 (June 28, 1993). In Case No. 98-2942 and Case No. 98-3143, Prime appeals FHWA's refusal to exercise its administrative jurisdiction.

The Owner-Operators also commenced an action in the Southern District of Ohio, alleging that the lease agreements used by Arctic Express, Inc., and its affiliate, D & A Associates, Ltd. (collectively, "Arctic Express"),

violate the same provisions of the Truth-in-Leasing regulations. Arctic Express appealed FHWA's Notice of Denial to the Sixth Circuit, which transferred the appeal to this court. That is Case No. 98-3478. The American Trucking Association has filed amicus briefs in support of the Prime and Arctic Express appeals, urging us to reverse the agency's refusal to exercise jurisdiction over the carriers' disputes with the Owner-Operators. The Ohio district court has stayed its proceedings pending our resolution of these appeals.

II. The ICC Termination Act and Its Antecedents

Prior to the ICC Termination Act, the ICC comprehensively regulated licensed motor carriers. Congress intended that the Termination Act substantially deregulate rail and motor carrier transportation. One area of regulation expressly addressed in the Act was dispute resolution. The Report of the House Transportation and Infrastructure Committee explained:

> In addition to overseeing the background commercial rules of the motor carrier industry, the ICC currently resolves disputes that arise in such areas. There is no explicit statutory requirement to do so. . . . The ICC dispute resolution programs include household goods and auto driveaway carriers, brokers, *owner-operator leasing*, loss and damage claims, duplicate payments and overcharges, and lumping.
>
> The bill transfers responsibility for all the areas in which the ICC resolves disputes to the Secretary (except passenger intercarrier disputes). *The Committee does not believe that DOT*

> *should allocate scarce resources to resolving these essentially private disputes, and specifically directs that DOT should not continue the dispute resolution functions in these areas. The bill provides that private parties may bring actions in court to enforce the provisions of the Motor Carrier Act.* This change will permit these private, commercial disputes to be resolved the way that all other commercial disputes are resolved – by the parties.

H.R.Rep. No. 104-311, at 87-88 (1995), *reprinted in* 1995-2 U.S.C.C.A.N. 793, 799-800 (emphasis added). Consistent with this explanation, the Committee described § 14704 of the House Bill as "provid[ing] for private enforcement of the provisions of the Motor Carrier Act in court. This expands the current law which only permits complaints brought under the Act to be brought before the ICC." *Id.* at 120-121, 1995-2 U.S.C.C.A.N. at 832-33. The Conference Committee ultimately adopted § 14704 of the House Bill. *See* H.R. Conf. Rep. No. 104-422, at 221-22 (1995), *reprinted in* 1995-2 U.S.C.C.A.N. 850, 906-07.

In these cases, the Owner-Operators seek to enforce the Truth-in-Leasing regulations in court, while the motor carriers seek to preserve the prior regime of exclusive administrative remedies. FWHA has declined to exercise jurisdiction over these private disputes, which is not surprising given the above-quoted congressional "directive." Before this court, the Owner-Operators and FHWA rely heavily on the Termination Act's legislative history. Prime, Arctic Express, and the American Trucking Association urge us to ignore this history because, "[w]hen the words of a statute are unambiguous . . . judicial inquiry is complete." *Connecticut Nat'l Bank v.*

Germain, 503 U.S. 249, 254 (1992) (internal quotation omitted). That is very true, and in all events our principal focus must be on the language of the relevant statutes. But we cannot ignore the broader perspective. The motor carriers argue that the dispute resolution provisions of the Termination Act unambiguously give FWHA not just primary but exclusive jurisdiction to resolve private disputes over the Truth-in-Leasing regulations. That interpretation is at odds with the overall congressional objective of partial deregulation *and* with the relevant committees' explanations of the specific provisions in question. To decide whether the motor carriers' plain language arguments surmount these obstacles, we begin by quoting the relevant Termination Act provisions:

> **49 U.S.C. § 14701. General authority**
>
> (a) INVESTIGATIONS. . . . If the Secretary or Board, as applicable, finds that a carrier . . . is violating this part, the Secretary or Board, as applicable, shall take appropriate action to compel compliance with this part. . . .
>
> (b) COMPLAINTS. A person, including a governmental authority, may file with the Secretary or Board, as applicable, a complaint about a violation of this part by a carrier. . . .
>
> **§ 14702. Enforcement by the regulatory authority**
>
> (a) IN GENERAL. The Secretary or the Board, as applicable, may bring a civil action –
>
> (2) to enforce this part, or a regulation or order of the Secretary or Board, as applicable, when violated by a carrier. . . .

§ 14703. Enforcement by the Attorney General

The Attorney General may, and on request of either the Secretary or the Board shall, bring court proceedings –

(1) to enforce this part or a regulation or order of the Secretary or Board or terms of registration under this part. . . .

§ 14704. Rights and remedies of persons injured by carriers . . .

(a) IN GENERAL. (1) ENFORCEMENT OF ORDER. A person injured because a carrier . . . does not obey an order of the Secretary or the Board, as applicable, under this part, except an order for the payment of money, may bring a civil action to enforce that order under this subsection. A person may bring a civil action for injunctive relief for violations of sections 14102 [the statute authorizing at least some of the motor carrier leasing regulations] and 14103.

(2) DAMAGES FOR VIOLATIONS. A carrier . . . is liable for damages sustained by a person as a result of an act or omission of that carrier or broker in violation of this part.

(b) LIABILITY AND DAMAGES FOR EXCEEDING TARIFF RATE. A carrier . . . is liable to a person for amounts charged that exceed the applicable rate for transportation or service contained in a tariff in effect under section 13702.

(c) ELECTION. (1) COMPLAINT TO DOT OR BOARD, CIVIL ACTION. A person may file a complaint with the Board or the Secretary, as applicable, under section 14701(b) or bring a civil action under subsection (b) to enforce liability against a carrier. . . .

> (2) ORDER OF DOT OR BOARD. –
>
> (B) ENFORCEMENT BY CIVIL ACTION. The person for whose benefit an order of the Board or Secretary requiring the payment of money is made may bring a civil action to enforce that order under this paragraph if the carrier . . . does not pay the amount awarded by the date payment was ordered to be made.

These are obviously complex provisions, creating both administrative and judicial enforcement and remedies. The private judicial remedies are in § 14704. Much of that section deals with suits to recover rate overcharges, a subject not at issue in these appeals. More relevant for our purposes are the "general" remedies in §§ 14704(a)(1) and (2). Broadly speaking, the Owner-Operators argue these provisions authorize direct actions against carriers in federal court for violations of the Truth-in-Leasing regulations, while the carriers argue these remedies are secondary to FHWA's administrative remedies in § 14701.

III. Specific Issues and Contentions

A. Does FHWA Have Exclusive Jurisdiction To Enforce the Truth-in-Leasing Regulations? A central issue is whether the Owner-Operators may bring a private right of action directly in the district court for violations of the regulations. If not, then their only remedy is to file administrative complaints under § 14701(b), and the district court was obviously correct in dismissing their action against Prime. The Owner-Operators and FHWA construe § 14704(a) as authorizing private rights of action for violations of the regulations. Prime and

Arctic Express respond that § 14704(a) only authorizes private suits to enforce FHWA *orders*, not agency regulations. Given the structure of § 14704(a), this issue has multiple subparts.

1. The first sentence of § 14704(a)(1) authorizes civil actions to enforce FHWA orders. FHWA construes this language as including suits to enforce its Truth-in-Leasing regulations, relying on cases in which the word "order" in judicial review statutes has been construed to authorize review of agency rules or regulations. *See, e.g., Northwest Airlines, Inc. v. Goldschmidt*, 645 F.2d 1309 (8th Cir. 1981); *Investment Co. Inst. v. Board of Governors of Fed. Reserve Sys.*, 551 F.2d 1270 (D.C. Cir. 1977). But those cases turned on the presumption in favor of judicial review, which does not apply in this case. Here, the issue is whether Congress has authorized private persons to *enforce* a particular type of agency action.

Viewed in context, FHWA's argument is contrary to the plain language of the statute. In § 14702(a)(2) and § 14703(1), Congress explicitly authorized FHWA and the Attorney General to sue to enforce "this part *or regulation or order*." The italicized words confirm that Congress in this statute distinguished between agency regulations and orders. Then, in § 14704(a)(1), the very next section, Congress granted private parties the right to sue to enforce an "order of the Secretary" that a carrier has not obeyed. Given the substantive and procedural differences between agency orders and regulations, and the policy differences inherent in government and private enforcement actions, we cannot ignore the plain language limiting the private right of action created by the first sentence of § 14704(a)(1) to suits to enforce agency orders. Thus,

the first sentence of § 14704(a)(1) does not authorize the Owner-Operators to sue for violations of the Truth-in-Leasing regulations.[2]

2. The second sentence of § 14704(a)(1) provides that a private party such as the Owner-Operators "may bring a civil action for injunctive relief for violations of section[ ] 14102," the section of the Motor Carrier Act that deals specifically with motor carrier leasing. Though this sentence refers only to violations of the statute, it must also include violations of FHWA's implementing regulations. Because § 14102 contains no mandates or prohibitions but simply authorizes the Secretary to adopt leasing requirements, it would be impossible for a carrier to violate the statute other than by violating rules or regulations promulgated under the statute.

Prime argues that this provision must be limited to actions brought to enforce FHWA orders because it is part of § 14704(a)(1), which is titled "Enforcement of Order." We disagree. "Section and subchapter titles cannot alter the plain meaning of a statute; they can only assist in

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[2] This question of statutory interpretation would be different if FHWA referred to its regulations as agency orders. *See Hawaiian Tel. Co. v. Public Utilities Comm'n*, 827 F.2d 1264, 1270-72 (9th Cir. 1987), *cert. denied*, 487 U.S. 1218 (1988), construing the Federal Communications Act, and *Pacific Fruit Exp. Co. v. Akron, Canton & Youngstown R.R.*, 524 F.2d 1025 (9th Cir. 1975), *cert. denied*, 424 U.S. 911 (1976), construing rail carrier provisions of the Interstate Commerce Act. Unlike the statutes at issue in those cases, the dispute resolution provisions of the ICC Termination Act expressly distinguish between orders and regulations, and the agency concedes we are dealing with regulations.

clarifying ambiguity." *Minnesota Transp. Regulation Bd. v. United States*, 966 F.2d 335, 339 (8th Cir. 1992). This sentence was added to § 14704(a)(1) in conference, and its plain language is not limited to violations of agency orders. Moreover, the sentence as construed by Prime would make little practical sense – a party suing to enforce an agency order is unlikely to need relief beyond enforcement of the order.[3]

The carriers further argue that, even if § 14704(a)(1) authorizes private actions for injunctive relief for violations of regulations promulgated under § 14102, the Owner-Operators' claims arise under regulations that were not promulgated under FWHA's § 14102 authority. In initially promulgating Truth-in-Leasing regulations, the ICC cited as authority both the predecessor of § 14102 and the statute giving the agency general power to issue regulations, now found in 49 U.S.C. § 13301(a). *See generally Global Van Lines, Inc. v. ICC*, 627 F.2d 546 (D.C. Cir. 1980), *cert. denied*, 449 U.S. 1079 (1981). Section 14102(a) authorizes the Secretary to prescribe specific types of leasing requirements. The carriers argue that the leasing regulations on which the Owner-Operators rely, 49 C.F.R. §§ 376.12(i) & (k), go beyond the scope of § 14102(a) and therefore may not be enforced by a private action for injunctive relief under § 14704(a)(1). There is a simple

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[3] Consistent with this interpretation, the Conference Report stated that private actions brought to enforce the "leasing . . . rules may also seek injunctive relief." H.R. Conf. Rep. No. 104-422 at 221, *reprinted in* 1995-2 USCCAN at 906.

answer to this contention – it is not part of the jurisdictional issues before us. Section 14704(a)(1) creates a private right of action for injunctive relief for violations of regulations promulgated under § 14102(a). The Owner-Operators invoked that portion of § 14704(a)(1) in commencing this action. Whether their claim for injunctive relief is valid must be addressed in the first instance by the district court.

3. Section 14704(a)(2) provides that "[a] carrier . . . is liable for damages sustained by a person as a result of an act or omission of that carrier . . . in violation of this part." The Owner-Operators argue this statute creates an express private right of action to remedy violations of the Truth-in-Leasing regulations. Prime argues § 14704(a)(2) must be read with § 14704(a)(1) as limited to actions to enforce agency orders. We decline to read these two subsections as interrelated. They are separate parts of § 14704(a), which is entitled, "In General." Moreover, a review of § 14704 in the two bills that were sent to conference, H.R. 2539 and S. 1396, reveals that the Conference Committee drafters reorganized this section in the final bill – the enforcement of agency orders section that is now § 14704(a)(1) and the damage remedy that is now § 14704(a)(2) were not previously linked.

The carriers further argue that the language of § 14704(a)(2) – a carrier "is liable for damages sustained" on account of a "violation of this part" – is not sufficient to authorize a private right of action for damages for violations of FHWA regulations. In this regard, we confess to being rather mystified by the inconsistent language used in the Termination Act's various enforcement provisions. In § 14702(a)(2) and § 14703(1), Congress

authorized FHWA and the Attorney General to sue "to enforce this part *or a regulation or order,*" whereas § 14704(a)(2) makes carriers liable in damages for conduct "in violation of this part." Moreover, the language of § 14704(a)(1) explicitly gives private parties the right to sue, whereas § 14704(a)(2) passively says that a carrier "is liable for damages sustained by a person." Despite these linguistic imperfections and inconsistencies, the most logical reading of the language of § 14704(a)(2) is that it authorizes private parties to sue for damages for carrier conduct "in violation of [regulations promulgated under] this part." And that interpretation is certainly reinforced by the legislative history of § 14704(a)(2). The Conference Report stated that § 14704(a)(2) "provides for private enforcement of the provisions of the Motor Carrier Act in court. . . . The ability to seek injunctive relief for motor carrier leasing . . . violations is in addition to and does not in any way preclude the right to bring civil actions for damages for such violations." H.R. Conf. Rep. No. 104-422 at 221-22, reprinted in 1995-2 U.S.C.C.A.N. at 906-07. In construing this inconsistently drafted statute, it is appropriate to use its legislative history to confirm the most plausible construction of a subsection's plain language. *See Wisconsin Public Intervenor v. Mortier,* 501 U.S. 597, 610 n.4 (1991).

For the foregoing reasons, we conclude that 49 U.S.C. § 14704(a) authorizes private actions for damages and injunctive relief to remedy at least some violations of the Motor Carrier Act and its implementing regulations. Thus, we reject the motor carriers' contention that FHWA's remedial jurisdiction is exclusive.

B. The Issue of FHWA Primary Jurisdiction. The district court properly concluded it has jurisdiction over the Owner-Operators' claims against Prime, jurisdiction that is concurrent with FHWA's administrative enforcement and remedial powers. However, as the court recognized, this does not resolve the issue of primary jurisdiction, a common law doctrine that allows a court to refer matters to an administrative agency to give the agency an opportunity to address issues within its expertise. *See Access Telecommunications v. Southwestern Bell Tel. Co.*, 137 F.3d 605, 608 (8th Cir.), *cert. denied*, 119 S. Ct. 404 (1998).

The district court invoked the doctrine of primary jurisdiction and dismissed the Owner-Operators' complaint. After the dismissal, the Owner-Operators petitioned FHWA for a declaratory order. The agency responded, refusing to exercise its discretionary jurisdiction under § 14701(a), or its discretion to commence an enforcement action under § 14702(a)(2), because Congress in the ICC Termination Act's legislative history told the agency not to allocate scarce resources to resolving private disputes. The agency further expressed its view that resolution of the Owner-Operators' claims "are fairly straightforward matters clearly within the competence of a court to resolve."

On appeal, the motor carriers argue we should compel FHWA to exercise its jurisdiction. However, they cannot point to a provision in the ICC Termination Act that overcomes "the presumption that agency decisions not to institute proceedings are unreviewable under" the Administrative Procedure Act. *Heckler v. Chaney*, 470 U.S. 821, 837 (1985); *see United States v. Gary*, 963 F.2d 180, 185

(8th Cir. 1992). The doctrine of primary jurisdiction enables a court to stay its hand while seeking the guidance of an administrative agency's perceived expertise. When the agency declines to provide guidance or to commence a proceeding that might obviate the need for judicial action, "[t]he court [can] then proceed according to its own light." *Atchison, Topeka & Santa Fe Ry. v. Aircoach Transp. Ass'n*, 253 F.2d 877, 886 (D.C. Cir. 1958), *cert. denied*, 361 U.S. 930 (1960); *see Local Union No. 189, Amalgamated Meat Cutters v. Jewel Tea Co.*, 381 U.S. 676, 686 (1965) ("the doctrine of primary jurisdiction is not a doctrine of futility"); *Skaw v. United States*, 740 F.2d 932, 938 (Fed. Cir. 1984). Accordingly, the district court should now proceed to exercise its jurisdiction over the Owner-Operators' claims against Prime.

C. **FHWA's Notice Ruling.** Prime argues that the Owner-Operators' *ex parte* application to FHWA for a declaratory order, and the agency's Notice denying that application, constitute an adjudication that violated the Administrative Procedure Act and Prime's right to due process. We strongly disapprove of the Owner-Operators' ex parte approach to the agency, and if the result had been an "adjudication" adverse to Prime's interests, we would reverse FHWA's ruling as procedurally improper. But there has been no such adjudication. FHWA's denial Notice had no more effect than if the agency had filed an amicus brief or memorandum with the district court declining the court's request for administrative guidance and expertise. To the extent FHWA expressed views that are relevant to the merits of Prime's dispute with the Owner-Operators, Prime will have ample opportunity to respond in the district court.

D. The Merits of the Underlying Dispute. Prime argues we should affirm the district court's dismissal of Count II of the Owner-Operators' complaint because the agreement containing the challenged terms was not a "lease" as defined by the Truth-in-Leasing regulations. Prime further argues we should affirm the dismissal of Count III because this Missouri law claim is preempted by federal law. These contentions go to the merits of the underlying dispute. They should be addressed in the first instance by the district court. We therefore decline to consider them at this time.

In Case No. 98-1420, we reverse the judgment of the district court and remand for further proceedings not inconsistent with this opinion. In Case No. 98-2942, Case No. 98-3143, and Case No. 98-3478, we deny the petitions for review.

A true copy.

Attest:

CLERK, U. S. COURT OF APPEALS, EIGHTH CIRCUIT.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF MISSOURI SOUTHERN DIVISION

OWNER-OPERATOR INDEPENDENT DRIVERS ASSOCIATION, INC, et al.,	)	
Plaintiffs,	)	No. 97-3408-CV-S-RGC
v.	)	
NEW PRICE, INC., d/b/a PRIME, INC., et al.,	)	
Defendants.	)	

ORDER

(Filed Nov. 17, 1997)

Presently before the Court is Defendant's Motion to Dismiss Plaintiffs' Complaint. On August 14, 1997, plaintiffs filed with this Court a Class Action Complaint for Damages and for Declaratory Relief. Thereafter, defendants filed with this Court their Motion to Dismiss. All briefings on the Motion have been completed, and the Motion is ripe for this Court's consideration. For the following reasons, defendants' Motion to Dismiss will be granted.

In passing on a motion to dismiss, a court must view the facts alleged in the complaint in the light most favorable to the plaintiff *Sheuer v. Rhodes*, 416 U.S. 232, 94 S.Ct. 1683, 40 L.Ed.2d 90 (1974); *Conley v. Gibson*, 355 U.S. 41, 45-46, 78 S.Ct. 99, 101-01, 2 L.Ed.2d 80 (1957); *Toombs v. Bell*, 798 F.2d 297, 298 (8th Cir. 1986). The court should not

grant a motion to dismiss merely because the complaint does not state with precision every element of the offense necessary for recovery. 5 Wright & Miller, *Federal Practice and Procedure:* Civil, § 1216 at 120 (1969). A complaint is sufficient if it contains "allegations from which an inference can be drawn that evidence on these material points will be introduced at trial." *Id.* at 122-23. Moreover, a court should not dismiss unless it "appears beyond a reasonable doubt that plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Conley,* 355 U.S. at 45-46, 78 S.Ct. at 102. Thus, a motion to dismiss is likely to be granted "only in the unusual case in which a plaintiff includes allegations that show on the face of the complaint that there is some insuperable bar to relief." *Fusco v. Xerox Corp.,* 676 F.2d 332, 334 (8th Cir. 1982).

A brief statement of the facts as established in the Complaint is necessary before the Court can pass on defendants' Motion. On August 14, 1997, plaintiffs filed with this Court a Class Action Complaint for Declaratory and Injunctive Relief. Plaintiffs are a class of owner-operators who operate motor vehicles in and through the state of Missouri and are, or are likely to be, employed by or otherwise associated with Defendants Prime and/or Success Leasing under the terms set forth in defendants' service contracts and lease-purchase agreements. In general, plaintiffs are seeking to have defendants' business practices declared unlawful and violation of federal motor carrier leasing regulations as administered by the Federal Highway Administration ("FHWA") under the United States Department of Transportation ("DOT") and the Surface Transportation Board ("STB").

The Complaint specifically alleges that owner-operators provided motor vehicle equipment to defendant Prime under the terms of a service contract. These same owner-operators entered into lease-purchase agreements with defendant Success Leasing under which the owner-operators lease from Success Leasing, with the option to purchase, the motor vehicle equipment that is the subject of the service contract between the owner-operators and defendant Prime. The owner-operators allege that defendant Prime has persisted in unjustifiably depriving owner-operators of escrow and other funds deposited with defendant Prime. The owner-operators also allege that the lease-purchase agreement with defendant Success Leasing is so prejudicial and unfair as to be unconscionable. Plaintiff alleges that defendant Success Leasing is a corporation owned by Defendant Prime which is a corporation engaged in the enterprise of providing transportation services to the shipping public under authority granted by the DOT.

Defendants make three arguments in support of their Motion to Dismiss. Defendants maintain that the doctrine of primary jurisdiction requires dismissal of all of plaintiffs' claims. In addition, defendants argue that plaintiffs' Count II should be dismissed because it attempts to apply federal law to an agreement not subject to federal regulation. Finally, defendants argue that plaintiffs' state law claim requesting rescission should be dismissed because it is preempted by federal law. Because defendants' argument concerning primary jurisdiction is dispositive, the Court need not consider defendants' other arguments.

Defendants maintain that the doctrine of primary jurisdiction requires that this Court dismiss plaintiffs'

cause of action. Primary jurisdiction "is a common law doctrine used to coordinate administrative and judicial decision making." *Red Lake Band of Chippewa Indians v. Barlow*, 846 F.2d 474, 476 (8th Cir. 1988). The doctrine applies when the claims presented "contain some issue within the special competence of an administrative agency." *Reiter v. Cooper*, 507 U.S. 258, 268, 113 S.Ct. 1213, 1220, 122 L.Ed.2d 604 (1993). The doctrine is especially appropriate when uniformity of decision making takes on special importance. *United States v. Western Pac. R. Co.*, 352 U.S. 59, 64-65, 77 S.Ct. 161, 165, 1 L.Ed.2d 126 (1956).

Plaintiffs argue that the doctrine of primary jurisdiction does not apply because plaintiffs are granted a private right of action under the law and because the agency's position is clear because the agency has already ruled regarding leasing and rental agreements similar to those present in this case. It is true that "[i]t is inappropriate to invoke the doctrine of primary jurisdiction in a case in which Congress, by statute, has decided that the courts should consider the issue in the first instance." *United States v. McDonnell Douglas Corp.*, 751 F.2d 220, 224 (8th Cir. 1984). However, primary jurisdiction may be invoked when a court and an agency have concurrent jurisdiction to decide a question. *Barlow* 846 F.2d at 476.

Plaintiffs bring their cause of action pursuant to 49 U.S.C. § 14704 which provides for a private right of action by person injured by motor carriers or brokers. However, the Court is not given exclusive jurisdiction under the statute. The allegations raised by plaintiffs in all counts raise complex issues concerning the breadth and applicability of 49 C.F.R. § 376 as relating to whether defendants' lease-purchase agreements and service contracts

are in compliance with and reasonable under the law and whether such lease-purchase agreements and service contracts are even under the authority of the FHWA. The DOT has delegated to the FHWA the responsibility for authority and oversight as granted to the DOT under 49 U.S.C. § 13501, *et seq.*, 49 U.S.C. § 14101, *et seq.*, and 49 U.S.C. § 14701, *et seq.* As a result, the Court continues to share concurrent jurisdiction with FHWA under the DOT. Accordingly, the Court finds that 49 U.S.C. § 14704 does not preclude application of the doctrine of primary jurisdiction.

Plaintiffs also argue that, because the agency's position is clear regarding plaintiffs' claims involving leasing as covered under 49 C.F.R. § 376, the agency's expertise is not necessary. In *United States v. Western Pac. R. Co.*, 352 U.S. 59, 66, 77 S.Ct. 161, 166, 1 L.Ed.2d 126 (1956), the Supreme Court noted that where a "determination of the meaning of a term . . . involves factors the adequate appreciation of which presupposes an acquaintance with the many intricate facts of transportation," the issue of applying the term must go to the agency. To answer the question of whether the service contracts and lease-purchase agreements in the instant case contained terms and information which complied with and are reasonable under federal motor freight carrier leasing regulations presupposes that the decision maker will have intimate knowledge of those regulations and the reasoning behind them. As a result, the FHWA is in a better position than the Court to make such a determination with respect to the questions presented by plaintiffs' Complaint.

Plaintiffs also argue that the FHWA has considered similar matters and, therefore, this Court need not worry

about rendering an inconsistent decision. The doctrine of primary jurisdiction should be applied to achieve "uniformity and consistency in the regulation of a business entrusted to a particular agency." *Nader v. Allegheny Airlines*, 426 U.S. 290, 303-04, 96 S.Ct. 1978, 1986-1989, 48 L.Ed.2d 643 (1976). The Court finds plaintiffs' arguments to be unpersuasive. Plaintiffs assert that the DOT and FHWA have spoken clearly on the issues presented in the matter at hand, however, plaintiffs cite only one decision and that decision is inapposite to plaintiffs' claims for relief. Even if it were true that the agency has decided exactly similar matters in a manner favorable to plaintiffs, the Court believes that the doctrine of primary jurisdiction should properly be invoked to avoid an inconsistent decision with the agency. Accordingly, the Court finds that the FHWA under the DOT is in a better position than the Court to adjudicate the matter currently before the Court and that such adjudication would avoid inconsistent decisions. The Court will, therefore, grant defendants' Motion to Dismiss.

Accordingly, it is

ORDERED that defendants' Motion to Dismiss Plaintiffs' Complaint is GRANTED.

/s/ Russell G. Clark
RUSSELL G. CLARK,
SENIOR JUDGE
UNITED STATES
DISTRICT COURT

Date: November 14, 1997

APPENDIX C

DEPARTMENT OF TRANSPORTATION [4910-22-P]

Federal Highway Administration

PETITION FOR DECLARATORY ORDER REGARDING APPLICATION OF FEDERAL MOTOR CARRIER TRUTH-IN-LEASING REGULATIONS

AGENCY: Federal Highway Administration (FHWA), DOT

ACTION: Notice of denial of petition for declaratory order.

SUMMARY: The Owner-Operator Independent Drivers Association, Inc. (OOIDA), Howard Jenkins, Marshall Johnson, Susan Johnson and Jerry Vanboetzelaer filed with the FHWA a petition for declaratory order (the OOIDA petition) seeking a formal ruling by the FHWA that New Prime, Inc., dba Prime, Inc. (Prime) and Success Leasing, Inc. (Success) violated certain provisions of the federal motor carrier truth-in-leasing regulations (49 CFR part 376). This petition was filed after the U.S. District Court for the Western District of Missouri dismissed petitioners' class action complaint against Prime and Success, seeking enforcement of these regulations, on the ground that FHWA has primary jurisdiction to determine whether the regulations have been violated.

The FHWA is denying the OOIDA petition because it fails to raise any issues not adequately addressed by existing legal precedent which require the special expertise of this agency. Although denials of petitions for declaratory orders will not ordinarily be published in the Federal Register, the FHWA is publishing this decision to

provide guidance to courts, carriers, owner-operators and other interested parties regarding the agency's general policy in handling such petitions, particularly those involving issues arising under the truth-in-leasing regulations. This policy applies to all petitions for declaratory orders, regardless of whether filed in connection with private litigation.

FOR FURTHER INFORMATION CONTACT: Mr. Michael J. Falk, Motor Carrier Law Division, Office of the Chief Counsel, (202) 366-1384, Federal Highway Administration, Department of Transportation, 400 Seventh Street, SW., Washington, D.C. 20590. Office hours are from 8 a.m. to 4:30 p.m., e.t., Monday through Friday, except Federal holidays.

SUPPLEMENTARY INFORMATION:

The OOIDA Petition

On March 5, 1998, OOIDA and four owner-operators filed a petition for declaratory order seeking a ruling from the FHWA that Prime and Success violated the truth-in-leasing regulations. Petitioners initially sought damages and enforcement of these regulations by filing a class action complaint, under 49 U.S.C. § 14704, in the U.S. District Court for the Western District of Missouri. However, the court dismissed the complaint on the ground that the FHWA had primary jurisdiction to resolve the issues in controversy.

According to the OOIDA petition, several owner-operators leased equipment to Prime which they obtained through lease-purchase agreements with success, an equipment leasing company allegedly under common

ownership with Prime. Under the terms of these lease-purchase agreements, Prime deducted rental/purchase payments for the equipment from the owner-operators' compensation and remitted the money to Success. Owner-operators were also required to remit money into several reserve funds maintained by Success to cover the cost of repairs and maintenance of the equipment. Owner-operators who terminated their leases with Prime were not refunded their reserve fund balances.

Petitioners claim that Prime violated 49 C.F.R. § 376.12(i) because its leases failed to specify the terms of any lease-purchase agreement authorizing the carrier to deduct lease purchase payments from lessor compensation. They also allege that the reserve funds maintained by Success are escrow funds within the meaning of 49 C.F.R. § 376.2(f), and that any balances in these funds must be returned to them with interest, within 45 days of termination of their leases, under 49 C.F.R. § 376.12(k).

Petitioners contend that the district court's dismissal of their complaint, potentially with prejudice: (1) conflicts with their right to seek private enforcement by filing a civil action under § 14704; (2) conflicts with congressional intent to eliminate DOT's role in resolving private disputes; and (3) improperly applied the doctrine of primary jurisdiction, which is limited to cases where the reasonableness of a federal regulation is in dispute and an agency's technical expertise is necessary to resolve the issues before the court. Petitioners have appealed the dismissal of their complaint to the Court of Appeals for the Eighth Circuit. Consequently, petitioners request, in the alternative, that the FHWA rule that it [sic] lacks

primary jurisdiction over regulatory issues where a private party has elected to litigate these issues in federal district court under 49 U.S.C. § 14704. Petitioners further contend that FHWA's technical expertise is not needed in this case because the Interstate Commerce Commission (ICC) previously ruled on the applicability of the part 376 escrow provisions to carrier-affiliated equipment leasing companies in *Dart Transit Company – Petition for Declaratory Order,* 9 I.C.C. 2d 700 (1993).

Petitions for Declaratory Orders

Although fairly new to the FHWA, petitions for declaratory orders were a common device for obtaining guidance from the ICC in resolving disputes within that agency's jurisdiction. An agency's authority to issue declaratory orders comes from § 5(d) of the Administrative Procedure Act, 5 U.S.C. § 554(e), which gives agencies "sound discretion" to issue declaratory orders to "terminate a controversy or remove uncertainty". The FHWA intends to exercise this authority much more selectively than the ICC because Congress, in transferring several ICC functions to the Department of Transportation (DOT) through the ICC Termination Act of 1995 (ICCTA), envisioned that DOT would generally not become involved in resolving disputes between private parties.

The ICCTA expanded the rights and remedies of persons injured by carriers by providing for private enforcement of its provisions in court. Under 49 U.S.C. § 14704, an injured party may seek both damages and injunctive relief against a motor carrier in federal district

court to redress violations of part 376. In discussing this provision, the House Transportation and Infrastructure Committee stated that DOT should not allocate its scarce resources to resolving essentially private disputes, and that the right of private enforcement "will permit these private, commercial disputes to be resolved the way that all other commercial disputes are resolved – by the parties". H. Rep. No. 104-311, pp. 87-88.

The FHWA believes that issuing declaratory orders, except in extraordinary circumstances, would undermine the Congressional intent to keep DOT out of private commercial disputes, particularly where one of the parties has filed suit in federal court under § 14704. Accordingly, although the FHWA reserves the right to issue declaratory orders to resolve controversies between third parties in appropriate circumstances, it will generally do so only in cases having industry-wide significance that raise issues not adequately addressed by existing legal precedent.

Primary Jurisdiction

The doctrine of primary jurisdiction is "a doctrine specifically applicable to claims properly cognizable in court that contain some issue within the special competence of an administrative agency." *Reiter v. Cooper,* 507 U.S. 258 (1993), at 268. In contrast to the doctrine of exhaustion of administrative remedies, it does not require parties to seek relief from the agency before invoking the jurisdiction of the court. The court, when faced with an issue it believes requires the special expertise of an agency, has equitable discretion to give that agency the

first opportunity to pass on the issue by staying further proceedings and giving the parties a reasonable opportunity to seek an administrative ruling. However, an agency is not required to rule on issues directly referred to it by a court or, as in this case, indirectly referred to it following a court's order of dismissal. If an agency declines to issue a ruling, the court must then resolve the issues without the benefit of the agency's views. See *Atchison, Topeka & S.F. Ry. Co. v. Aircoach Transp. Ass'n, 253 F.2d 877 (D.C. Cir., 1958).*

Although the FHWA does not agree with petitioners' contention that the doctrine of primary jurisdiction applies only to issues involving the reasonableness of a federal regulation, it does agree that special expertise is generally not needed to resolve disputes regarding the part 376 truth-in-leasing regulations. These regulations contain specific, straightforward, non-technical requirements which a court is ordinarily competent to construe. Consistent with the Congressional intent underlying 49 U.S.C. § 14704, the FHWA will generally decline in exercise its primary jurisdiction with regard to court referrals involving violations of part 376.

Conclusion

The OOIDA petition does not raise issues which require special expertise by the FHWA. The question is of whether Prime's leases contain the necessary terms required by § 376.12(i), or whether escrow funds were returned within 45 days of lease termination, are fairly straightforward matters clearly within the competence of a court to resolve. Although part 376 does not expressly

apply to carrier-affiliated equipment leasing companies, the ICC fully addressed the applicability of the regulations to such entities in the *Dart* decision. The FHWA sees no reason to revisit this issue. Accordingly, OOIDA's petition for declaratory order is denied.

In Washington, District of Columbia, this 29th day of May, 1998.

/s/ Gloria J. Jeff
Kenneth R. Wykle
Administrator

APPENDIX D

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 98-142OWMS

Owner-Operator Independent Drivers Association, Inc. et al.,	*	Order Denying Petition for Rehearing and for Rehearing En Banc
Appellants,	*	
v.	*	
New Prime, Inc. doing business as Prime, Inc., Success Leasing, Inc.,	*	
Appellees.	*	

The petition for rehearing en banc is denied. The petition for rehearing by the panel is also denied.

(5128-010199)

October 13, 1999

Order Entered at the Direction of the Court:

/s/ Michael E. Gans
Clerk, U.S. Court of Appeals,
Eighth Circuit

APPENDIX E

49 U.S.C.

§ 14701. General authority

(a) Investigations. – The Secretary of the Board, as applicable, may begin an investigation under this part on the Secretary's or the Board's own initiative or on complaint. If the Secretary or Board, as applicable, finds that a carrier or broker is violating this part, the Secretary or Board, as applicable, shall take appropriate action to compel compliance with this part. If the Secretary finds that a foreign motor carrier or foreign motor private carrier is violating chapter 139, the Secretary shall take appropriate action to compel compliance with that chapter. The Secretary or Board, as applicable, may take action under this subsection only after giving the carrier or broker notice of the investigation and an opportunity for a proceeding.

(b) Complaints. – A person, including a governmental authority, may file with the Secretary or Board, as applicable, a complaint about a violation of this part by a carrier providing, or broker for, transportation or service subject to jurisdiction under this part or a foreign motor carrier or foreign motor private carrier providing transportation registered under section 13902 of this title. The complaint must state the facts that are the subject of the violation. The Secretary or Board, as applicable, may dismiss a complaint that it determines does not state reasonable grounds for investigation and action.

(c) Deadline. – A formal investigative proceeding begun by the Secretary or Board under subsection (a) of

this section is dismissed automatically unless it is concluded with administrative finality by the end of the 3d year after the date on which it was begun.

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§ 14702. Enforcement by the regulatory authority

(a) In general. – The Secretary or the Board, as applicable may bring a civil action –

(1) to enforce section 14103 of this title; or

(2) to enforce this part, or a regulation or order of the Secretary or Board, as applicable, when violated by a carrier or broker providing transportation or service subject to jurisdiction under subchapter I or III of chapter 135 of this title or by a foreign motor carrier or foreign motor private carrier providing transportation registered under section 13902 of this title.

(b) Venue. – In a civil action under subsection (a)(2) of this section –

(1) trial is in the judicial district in which the carrier, foreign motor carrier, foreign motor private carrier, or broker operates;

(2) process may be served without regard to the territorial limits of the district or of the State in which the action is instituted; and

(3) a person participating with a carrier or broker in a violation may be joined in the civil action without regard to the residence of the person.

(c) Standing. – The Board, through its own attorneys, may bring or participate in any civil action involving motor carrier undercharges.

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§ 14703. Enforcement by the Attorney General

The Attorney General may, and on request of either the Secretary or the Board shall, bring court proceedings –

(1) to enforce this part or a regulation or order of the Secretary or Board or terms of registration under this part; and

(2) to prosecute a person violating this part or a regulation or order of the Secretary or Board or term of registration under this part.

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§ 14704. Rights and remedies of persons injured by carriers or brokers

(a) In general. –

(1) Enforcement of order. – A person injured because a carrier or broker providing transportation or service subject to jurisdiction under chapter 135 does not obey an order of the Secretary or the Board, as applicable, under this part, except an order for the payment of money, may bring a civil action to enforce that order under this subsection. A person may bring a

civil action for injunctive relief for violations of sections 14102 and 14103.

(2) Damages for violations. – A carrier or broker providing transportation or service subject to jurisdiction under chapter 135 is liable for damages sustained by a person as a result of an act or omission of that carrier or broker in violation of this part.

(b) Liability and damages for exceeding tariff rate. – A carrier providing transportation or service subject to jurisdiction under chapter 135 is liable to a person for amounts charged that exceed the applicable rate for transportation or service contained in a tariff in effect under section 13702.

(c) Election. –

(1) Complaint to DOT or Board; civil action. – A person may file a complaint with the Board or the Secretary, as applicable, under section 1470(b) or bring a civil action under subsection (b) to enforce liability against a carrier or broker providing transportation or service subject to jurisdiction under chapter 135.

(2) Order of DOT or Board. –

(A) In general. – When the Board or Secretary, as applicable, makes an award under subsection (b) of this section, the Board or Secretary, as applicable, shall order the carrier to pay the amount awarded by a specific date. The Board or Secretary, as applicable, may order a carrier or broker providing transportation or service subject to jurisdiction under chapter 135 to pay

damages only when the proceeding is on complaint.

(B) Enforcement by civil action. – The person for whose benefit an order of the Board or Secretary requiring the payment of money is made may bring a civil action to enforce that order under this paragraph if the carrier or broker does not pay the amount awarded by the date payment was ordered to be made.

(d) Procedure. –

(1) In general. – When a person begins a civil action under subsection (b) of this section to enforce an order of the Board or Secretary requiring the payment of damages by a carrier or broker providing transportation or service subject to jurisdiction under chapter 135 of this title, the text of the order of the Board or Secretary must be included in the complaint. In addition to the district courts of the United States, a State court of general jurisdiction having jurisdiction of the parties has jurisdiction to enforce an order under this paragraph. The findings and order of the Board or Secretary are competent evidence of the facts stated in them. Trial in a civil action brought in a district court of the United States under this paragraph is in the judicial district in which the plaintiff resides or in which the principal operating office of the carrier or broker is located. In a civil action under this paragraph, the plaintiff is liable for only those costs that accrue on an appeal taken by the plaintiff.

(2) Parties. – All parties in whose favor the award was made may be joined as plaintiffs in a civil action brought in a district court of the United States under this subsection and all the carriers that are parties to the order awarding damages may be joined as defendants. Trial in the action is in the judicial district in which any one of the plaintiffs could bring the action against any one of the defendants. Process may be served on a defendant at its principal operating office when that defendant is not in the district in which the action is brought. A judgment ordering recovery may be made in favor of any of those plaintiffs against the defendant found to be liable to that plaintiff.

(e) Attorney's fees. – The district court shall award a reasonable attorney's fee under this section. The district court shall tax and collect that fee as part of the costs of the action.

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§ 14705. Limitation on actions by and against carriers

(a) In general. – A carrier providing transportation or service subject to jurisdiction under chapter 135 must begin a civil action to recover charges for transportation or service provided by the carrier within 18 months after the claim accrues.

(b) Overcharges. – A person must begin a civil action to recover overcharges within 18 months after the claim accrues. If the claim is against a carrier providing

transportation subject to jurisdiction under chapter 135 and an election to file a complaint with the Board or Secretary, as applicable, is made under section 14704(c)(1), the complaint must be filed within 3 years after the claim accrues.

(c) Damages. – A person must file a complaint with the Board or Secretary, as applicable, to recover damages under section 14704(b) within 2 years after the claim accrues.

(d) Extensions. – The limitation periods under subsection (b) of this section are extended for 6 months from the time written notice is given to the claimant by the carrier of disallowance of any part of the claim specified in the notice if a written claim is given to the carrier within those limitation periods. The limitation periods under subsection (b) and (c) of this section are extended for 90 days from the time the carrier begins a civil action under subsection (a) to recover charges related to the same transportation or service, or collects (without beginning a civil action under that subsection) the charge for that transportation or service if that action is begun or collection is made within the appropriate period.

(e) Payment. – A person must begin a civil action to enforce an order of the Board or Secretary against a carrier within 1 year after the date of the order.

(f) Government transportation. – This section applies to transportation for the United States Government. The time limitations under this section are extended, as related to transportation for or on behalf of the United States Government, for 3 years from the later of the date of –

(1) payment of the rate for the transportation or service involved;

(2) subsequent refund for overpayment of that rate; or

(3) deduction made under section 3726 of title 31.

(g) **Accrual date.** – A claim related to a shipment of property accrues under this section on delivery or tender of delivery by the carrier.

APPENDIX F

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March 5, 1998

VIA HAND DELIVERY

Kenneth R. Wykle, Administrator
Federal Highway Administration
400 Seventh Street, SW, Room 4218
Washington, D.C. 20590

Re: Petition to Federal Highway Administration for Declaratory Order Regarding Application of Federal Motor Carrier Truth-in-Leasing Regulations

Dear Mr. Wykle:

Please find enclosed herewith the Petition entitled *Owner-Operator Independent Drivers Association, Inc., Howard Jenkins, Marshall Johnson, Susan Johnson, and Jerry Vandoetzelaer: PETITION FOR DECLARATORY ORDER REGARDING APPLICATION OF FEDERAL MOTOR CARRIER TRUTH-IN-LEASING REGULATIONS* (the "Petition").

Submission of this Petition follows upon a recent ruling by the United States District Court for the Western

District of Missouri in a Federal class action styled as *Owner-Operator Independent Drivers Association, Inc., Howard Jenkins, Marshall Johnson, Susan Johnson, and Jerry Vandoetzelaer, on Behalf of Themselves and All Others Similarly Situated v. New Prime, Inc., d/b/a Prime, Inc., and Success Leasing, Inc.*, Case No. 97-3408-CV-S-RGC (W.D. Mo. 1997) (the "*Prime* Lawsuit), the Honorable Russell G. Clark presiding. In the District Court proceeding, the *Prime* plaintiffs challenge the lawfulness of the defendants' lease agreements and equipment rental-purchase contracts as applied to the class members, maintaining, *inter alia*, that those agreements contain terms that unlawfully require the class members to forfeit, and unlawfully permit defendants to possess and retain, escrow and other funds in direct violation of Federal commercial transportation laws and regulations as set forth under the United States Code and the Code of Federal Regulations. *See generally* 49 U.S.C. §§ 13301, 13501, 14102, and 14704; 49 C.F.R. §§ 376.12(i) and (k).

On November 17, 1997, the Missouri District Court granted the *Prime* defendants' motion to dismiss pursuant to Federal Rule of Civil Procedure ("FRCP") 12(b)(6). In its decision, the Court invoked the doctrine of primary jurisdiction in support of the proposition that the claims in the *Prime* Lawsuit would more appropriately be presented to and decided by the Department of Transportation (the "DOT"), and its agency, the Federal Highway Administration (the "FHWA"). For your reference, we have enclosed copies of the complaint in the *Prime* Lawsuit, the Court's decision granting defendants' FRCP 12(b)(6) motion, and the *Prime* plaintiffs' motion for

reconsideration of the Court's decision (denied December 30, 1997).

Petitioners herein (plaintiffs in the *Prime* Lawsuit) maintain that the District Court's reliance on the primary jurisdiction doctrine in dismissing the *Prime* complaint is insupportable. As the *Prime* plaintiffs argued in their motion for reconsideration, the doctrine of primary jurisdiction should not apply in the *Prime* Lawsuit because, *inter alia*, (1) under the ICC Termination Act of 1995 (P.L. 104-88), plaintiff parties are granted a private right of action through which to seek redress for violations of the Federal motor carrier leasing regulations (49 U.S.C. § 14704); (2) the Congress and the DOT both have explicitly directed and acknowledged that, pursuant to the ICC Termination Act, persons may elect to bring civil actions to enforce the Federal leasing regulations, and that the DOT should not attempt to resolve private-party disputes involving those regulations (*see ICC Termination Act of 1995: Report of the Committee on Transportation and Infrastructure on H.R. 2539, House of Representatives*, 104th Cong., H.R. Rep. No. 104-311 (November 6, 1995); U. S. Dept. of Transportation, *Report on the Functions of the Interstate Commerce Commission* (July 1995)); (3) the doctrine of primary jurisdiction applies only where a party challenges the reasonableness of a Federal regulation, not where a party alleges a violation of a Federal regulation (*see Nader v. Allegheny Airlines, Inc.*, 426 U.S. 290 (1976); *Civil Aeronautics Board v. Modern Air Transport, Inc.*, 197 F.2d 622 (2d Cir. 1950)); and (4) the technical expertise and guidance of the DOT and the FHWA are not needed in the *Prime* case because the DOT (*i.e.*, the former Interstate Commerce Commission ("ICC")), already has made

the determinations regarding the applicability of the Federal motor carrier leasing regulations' escrow provisions (49 C.F.R. § 376 *et seq.*) requisite to guiding Federal Court rulings on such matters. *See generally* OPA Information Bulletin No. 93-103, No. MC-C-30192, *Dart Transit Company – Petition for Declaratory Order,* 9 I.C.C.2d 700 (June 28, 1993).

What is especially puzzling about the Missouri Court's ruling is that, despite its professed need for agency guidance, the Court failed to refer the *Prime* plaintiffs' claims to the DOT and/or the FHWA (in fact, the Court neglected even to indicate whether its dismissal was with or without prejudice). As the United States Supreme Court has held, the proper procedure for the District Court in those instances where the primary jurisdiction doctrine does apply is to refer any specific matters requiring technical expertise or guidance to the appropriate agency, and to stay litigation proceedings pending the agency's conclusions. *See Reiter, et al. v. Cooper, et al.,* 507 U.S. 258 (1993).

The *Prime* plaintiffs have appealed the Western District's dismissal ruling to the Eighth Circuit Court of Appeals. Pending that appeal, however, Petitioners herein have determined it prudent, and in the interests of justice, to submit the present Petition to the FHWA. This petition does not seek the FHWA's adjudication of the legal and factual issues raised in the District Court litigation. We do, however, ask the agency to exercise whatever authority it considers itself to have to provide the District Court with technical expertise or guidance on the issues identified in the Petition.

It is worth noting the OOIDA, its members, and others interested in the plight of owner-operators are involved in a host of other leasing regulation cases, both current and pending. *See, e.g., Owner-Operator Independent Drivers Association, Inc., Carl Harp, Garvin Keith Roberts, and Michael Wiese, on Behalf of Themselves and All Others Similarly Situated v. Arctic Express, Inc., and D&A Associates, Ltd.*, Case No. C2-97-750 (S.D. Ohio 1997); *Owner-Operator Independent Drivers Association, Inc., and Shawn Lewis, Individually and on Behalf of All Others Similarly Situated v. Caliber System, Inc., and its subsidiary, Caliber Logistics Inc.* (formerly Roadway Logistics Systems, Case No. 5:97-CV-2242 (N.D. Ohio 1997); *Padrta, et al. v. Ledar Transport, Inc.*, Case No. 96-0324-CV-W-2 (W.D. Mo. 1996). In fact, OOIDA has on its agenda literally dozens of cases, on behalf of its members, suitable for class action litigation under the Federal motor carrier statutes and regulations.

Like the *Prime* Lawsuit, each of these cases has been or will be brought under the private right of action afforded plaintiffs under the ICC Termination Act, and each is based on allegations of violations of the Federal motor carrier truth-in-leasing regulations. Clearly, if the issues involving the appropriateness of casting leasing regulation claims as civil suits (what the Missouri Western District erroneously has determined to be a matter of "primary jurisdiction") are not resolved at this juncture, the FHWA inevitably will be confronted with a landslide of requests for intervention by plaintiffs who have been denied access to the Federal courts and left in procedural

limbo – resulting ultimately in the enormous administrative burdenson the DOT that the ICC Termination Act was intended to prevent.

We would be happy to provide you with any additional information or documentation you might require in your consideration of this matter. Moreover, we would be delighted to meet with you or other interested FHWA personnel to discuss these important issues in person.

Sincerely,

/s/ Paul D. Cullen, Sr.
PAUL D. CULLEN, SR.
GREGORY M. CORK
CULLEN & O'CONNELL

PDC/GMC/
Enclosures

bcc: James J. Johnston, President, OOIDA
Thomas A. Sheehan, Shook, Hardy & Bacon, LLP
Mike Faulk, FHWA

BEFORE THE
UNITED STATES DEPARTMENT
OF TRANSPORTATION
FEDERAL HIGHWAY ADMINISTRATION
WASHINGTON, D.C.

OWNER-OPERATOR INDEPENDENT DRIVERS ASSOCIATION, INC., HOWARD JENKINS, MARSHALL JOHNSON, SUSAN JOHNSON, and JERRY VANBOETZELAER, **Petitioners.**	**Docket No. _____**

PETITION FOR DECLARATORY ORDER REGARDING APPLICATION OF FEDERAL MOTOR CARRIER TRUTH-IN-LEASING REGULATIONS

OWNER-OPERATOR INDEPENDENT DRIVERS ASSOCIATION, INC., HOWARD JENKINS, MARSHALL JOHNSON, SUSAN JOHNSON, and JERRY VANBOETZELAER

Petitioners

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Counsel for Petitioners

BEFORE THE
UNITED STATES DEPARTMENT
OF TRANSPORTATION
FEDERAL HIGHWAY ADMINISTRATION
WASHINGTON, D.C.

OWNER-OPERATOR INDEPENDENT DRIVERS ASSOCIATION, INC., HOWARD JENKINS, MARSHALL JOHNSON, SUSAN JOHNSON, and JERRY VANBOETZELAER, Petitioners.	Docket No. _____

PETITION FOR DECLARATORY ORDER REGARDING APPLICATION OF FEDERAL MOTOR CARRIER TRUTH-IN-LEASING REGULATIONS

The Owner-Operator Independent Drivers Association, Inc. ("OOIDA"), Howard Jenkins, Marshall Johnson, Susan Johnson, and Jerry Vanboetzelaer (collectively, "Petitioners"), by their counsel, hereby submit their Petition for Declaratory Order Regarding Application of the Federal Motor Carrier Truth-in-Leasing Regulations (the "Petition").

Summary of Petition and Requested Relief

Petitioners are independent truck owner-operators[1] who have (1) contracted for the rental of trucking equipment from the affiliate of an authorized motor carrier, and (2) used that rented equipment in service to the authorized motor carrier under the terms of a Federally regulated lease agreement. Petitioners assert that the lease-purchase scheme perpetrated by the authorized carrier and its affiliated equipment rental company violates Federal motor carrier leasing regulations (49 C.F.R. § 376.12) by unlawfully requiring Petitioners to forfeit, and unlawfully permitting the motor carrier to possess and retain, escrow and other funds to which only Petitioners are entitled.

Case History and Procedural Background

On August 14, 1997, Petitioners herein filed and served a Class Action Complaint in the United States District Court for the Western District of Missouri, styled as *Owner-Operator Independent Drivers Association, Inc., Howard Jenkins, Marshall Johnson, Susan Johnson, and Jerry*

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[1] Each of the named individual Petitioners is an independent truck owner-operator. OOIDA is an international business association founded in 1973 to represent the interests of owner-operators. OOIDA's standing as a representative of owner-operators has been acknowledged and approved in numerous matters before the Federal Courts. *See, e.g., Owner-Operator Independent Drivers Assoc., et al. v. Keith Bissell et al.*, Nos. 94-6178/6179 (*per curiam*, 6th Cir., August 21, 1997) ("the district court correctly concluded that OOIDA has standing to litigate this action as a representative of its members").

Vandbetzelaer, on Behalf of Themselves and All Others Similarly Situated v. New Prime, Inc., d/b/a Prime, Inc., and Success Leasing, Inc., Case No. 97-3408-CV-S-RGC (W.D. Mo. 1997), the Honorable Russell G. Clark presiding (the *Prime* Lawsuit"). (A copy of the *Prime* complaint is attached hereto as **Exhibit A**.) The *Prime* plaintiffs have challenged the lawfulness of the defendants' lease agreements and equipment rental-purchase contracts as applied to the class members, maintaining, *inter alia*, that those agreements contain terms that unlawfully require the class members to forfeit, and unlawfully permit defendants to possess and retain, escrow and other funds in direct violation of Federal commercial transportation laws and regulations as set forth under the United States Code and the Code of Federal Regulations. *See generally* 49 U.S.C. §§ 13301, 13501, 14102, and 14704; 49 C.F.R. §§ 376.12(i) and (k).

On October 1, 1997, defendants in the *Prime* Lawsuit filed a motion to dismiss the complaint under Federal Rule of Civil Procedure 12(b)(6), arguing that "primary jurisdiction" over the *Prime* plaintiffs' claims rests with the Department of Transportation (the "DOT"), and its agency, the Federal Highway Administration (the "FHWA"). (A copy of the *Prime* defendants' 12(b)(6) motion is attached hereto as **Exhibit B**.) Notwithstanding the *Prime* plaintiffs' well-supported opposition to defendants' motion (a copy of which is attached hereto as **Exhibit C**), the Western District of Missouri granted the *Prime* defendants' motion to dismiss on November 17, 1997, invoking the doctrine of primary jurisdiction in professed support of the proposition that the claims in the *Prime* Lawsuit are more appropriately presented to

and decided by the DOT and the FHWA. (A copy of the District Court's dismissal order is attached hereto as **Exhibit D.**) Specifically, the Court stated that "the FHWA under the DOT is in a better position than the Court to adjudicate the matter currently before the Court." *See* dismissal order at p. 5.

Subsequently, the *Prime* plaintiffs filed a motion for the Court's reconsideration of its ruling. In their reconsideration motion (a copy of which is attached hereto as **Exhibit E**), the *Prime* plaintiffs argued that the doctrine of primary jurisdiction does not apply in the *Prime* Lawsuit because, *inter alia*, (1) under the ICC Termination Act, plaintiff parties are granted a private right of action through which to seek redress for violations of the Federal motor carrier leasing regulations (49 U.S.C. § 14704); (2) the Congress and the DOT both have explicitly directed and acknowledged that, pursuant to the ICC Termination Act, persons may elect to bring civil actions to enforce the Federal leasing regulations, and that the DOT should not attempt to resolve private-party disputes involving those regulations (*see ICC Termination Act of 1995: Report of the Committee on Transportation and Infrastructure on H.R. 2539, House of Representatives,* 104th Cong., H.R. Rep. No. 104-311 (November 6, 1995), at 87-88, 120-121; U.S. Dept. of Transportation, *Report on the Functions of the Interstate Commerce Commission* (July 1995), at 86); (3) the doctrine of primary jurisdiction applies only where a party challenges the reasonableness of a Federal regulation, not where a party alleges a violation of a Federal regulation (*see Nader v. Allegheny Airlines, Inc.*, 426 U.S. 290, 305-306 (1976), *Civil Aeronautics Board v. Modern Air Transport, Inc.*, 197 F.2d 622, 624-625

(2d Cir. 1950)); and (4) the technical expertise and guidance of the DOT and the FHWA are not needed in the *Prime* case because the DOT (*i.e.*, the former Interstate Commerce Commission ("ICC")), already has made the determinations regarding the applicability of the Federal motor carrier leasing regulations' escrow provisions (49 C.F.R. § 376 *et seq.*) requisite to guiding Federal Court rulings on such matters. *See generally* OPA Information Bulletin No. 93-103, No. MC-C-30192. *Dart Transit Company – Petition for Declaratory Order,* 9 I.C.C.2d 700 (June 28, 1993).

The Missouri Western District Court denied the *Prime* plaintiffs' motion for reconsideration on December 30, 1997. The *Prime* plaintiffs noticed their appeal of the Western District's ruling on January 17, 1998. (A copy of the notice of appeal is attached hereto as **Exhibit F.**) That appeal is now pending before the Eighth Circuit Court of Appeals.

Request for Declaratory Order

Despite its professed need for agency guidance, the Missouri Western District Court failed to refer the *Prime* plaintiffs' claims to the FHWA. Nevertheless, Petitioners herein presume that the Court intended that the *Prime* plaintiffs should seek guidance from the FHWA on the issues implicated in the *Prime* Lawsuit.[2]

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[2] *See Reiter, et al. v. Cooper, et al.*, 507 U.S. 258, 268 (1993) (in instances where the primary jurisdiction doctrine is determined to be applicable, the proper procedure for the District Court is to refer any specific matters requiring technical expertise or

Accordingly, Petitioners seek an order from the FHWA declaring that:

(1) under the Federal motor carrier leasing regulations and controlling decisional precedent, a Federally regulated lease agreement between an authorized motor carrier lessee and an operator-lessor must specify the terms of a separate, independent equipment purchase or rental contract between the operator-lessor and a third party affiliated with the carrier lessee, which does not directly give the carrier lessee the right to make deductions from the operator-lessor's compensation for purchase or rental payments;

(2) under the Federal motor carrier leasing regulations and controlling decisional precedent, a Federally authorized motor carrier lessee must treat money remitted to an affiliated third party's equipment maintenance reserve fund as the carrier's own escrow fund; and

(3) under the Federal motor carrier leasing regulations and controlling decisional precedent, a Federally authorized motor carrier lessee is required to return money remitted to an affiliated third party's equipment maintenance reserve fund to the operator-lessor, with interest, within 45 days of the termination of a lease.

In the alternative, should the FHWA determine that this matter should not be decided by it, Petitioners request that the FHWA declare that applicable law does not confer upon the FHWA primary jurisdiction over regulatory issues in private commercial Federal Court

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guidance to the appropriate agency, and to stay litigation proceedings pending the agency's conclusions).

litigation arising under 49 U.S.C. §§ 14704, and that such matters should be resolved by the Federal Courts pursuant to the ICC Termination Act of 1995 (P.L. 104-88).

Respectfully submitted,

OWNER-OPERATOR INDEPENDENT DRIVERS ASSOCIATION, INC., HOWARD JENKINS, MARSHALL JOHNSON, SUSAN JOHNSON, and JERRY VANBOETZELAER

Petitioners

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APPENDIX G

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

TOBIAS RENTERIA, Plaintiff, v. K&R TRANSPORTATION, INC., et al., Defendants.	CASE NO. CV 98-290 MRP MEMORANDUM OF DECISION (and related case numbers 98-356, 98-357, 98-358, 98-359, 98-362, 98-392, 98-393, 98-394, 98-395, 98-396, 98-397, 98-398, 98-399, 98-400, 98-401, 98-406, 98-413, 98-417, 98-426, 98-427, 98-430, 98-435, 98-490, 98-504, 98-505, 98-506) (Filed Febr. 23, 1999)

BACKGROUND

These cases are brought by individual owner-operators of trucks against various trucking companies alleging that monies due them under leasing agreements with the companies have been unlawfully withheld.[1] A complaint taken as typical alleges seven state and common law claims and one claim under the federal Interstate Commerce Commission Termination Act of 1995 ("ICCTA"). The basis of each of these claims is that the leasing

[1] In each of the cases, the owner-operator leases his or her vehicle to the defendant company under a form agreement.

agreements between the owner-operators and the trucking companies violate not only the ICCTA and the Truth-in-Leasing Regulations, found at 49 C.F.R. § 376.12, but also various state laws.

Plaintiffs' state and common law claims allege breach of fiduciary duty, misrepresentation, violation of state insurance and business practices laws, deceit, illegal conversion, and failure to pay the reasonable value of services. These claims are based on state laws controlling wages, insurance, workers' compensation, and business practices governing the reporting of earnings.

The Court requested that the parties brief two issues in this case. First, whether plaintiffs' state and common law claims, outlined above, are preempted by the ICCTA, 49 U.S.C. §§ 13101, et seq. Second, whether plaintiffs have a private cause of action for damages under the ICCTA without first obtaining an order from the appropriate administrative agency.

ANALYSIS

I. Preemption of State and Common Law Claims

Defendants contend that the plain meaning of the ICCTA's preemption clause, the intent of Congress, and the Supreme Court's "broad interpretation" of analogous preemption clauses compel a conclusion that these state law claims are preempted.

The Supreme Court has recognized three types of preemption: conflict preemption, field preemption, and express preemption. *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504, 516 (1992). Conflict preemption is present

"when compliance with both state and federal law is impossible," or when "the state law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Freightliner Corp. v. Myrick* 514 U.S. 280, 287 (1995). Field preemption exists when federal law so thoroughly occupies a legislative field "as to make reasonable the inference that Congress left no room for the State to supplement it." *Fidelity Fed. Sav. & Loan Ass'n. v. de la Cuesta,* 455 U.S. 141, 153 (1982) (citation omitted). Finally, there is express preemption when Congress explicitly states its intent to displace state law. *See Cipollone,* 505 U.S. at 516.

The presumption is that Congress does not intend to supplant state law. *New York State Conference of Blue Cross & Blue Shield Plans v. Travelers, Ins. Co.,* 514 U.S. 645 (1995). To overcome the presumption that state laws dealing with matters traditionally within a state's police powers are not preempted, Congress's intent to preempt must be clear. *Californians for Safe and Competitive Dump Truck Transportation v. Mendonca* 152 F.3d 1184, 1186 (9th Cir. 1998). In addressing preemption claims, "the purpose of Congress is the ultimate touchstone." *Ingersoll-Rand Co. v. McClendon* 498 U.S. 133 (1990). Because preemption claims turn on Congress's intent, an analysis of the text of the provision in question is the starting point of the inquiry.

a. The ICCTA

Plaintiffs' federal claim arises under the ICCTA, 49 U.S.C. §§ 13101, et seq., and the Truth-in-Leasing Regulations, found at 49 C.F.R. § 376.12. Congress enacted an express preemption provision at § 14501 of the ICCTA.

i. Text of the preemption provision

Enacted in the Federal Aviation Administration Act of 1994 ("FAAA"), section 14501 provides that no state may enact or enforce a law "related to a price, route, or service of any motor carrier . . . with respect to the transportation of property." 49 U.S.C. § 14501 (c).[2]

Congress included in the section a non-exhaustive list of state laws which are not preempted. *See* § 14501 (c)(2). This section states that the preemption provision shall not restrict "the authority of a State to regulate motor carriers with regard to minimum amounts of financial responsibility relating to insurance requirements and self-insurance authorization." This provision makes clear that Congress has not so thoroughly occupied this legislative field as to preclude the states from supplementing it. There is no field preemption here.

ii. Legislative History

In attempting to interpret the "relate to" preemption language, the Supreme Court stated that it must go beyond the text and look to the objectives of the statute as a guide to the scope of the state law that Congress intended should survive. *Travelers, Inc. Co.,* at 656.

In passing the ICCTA, Congress indicated that across-the-board deregulation was necessary to eliminate

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[2] Section 14501 was originally enacted in the FAAA Act at 49 U.S.C. § 11501, but was repealed by the ICCTA. The ICCTA recodified the preemption provision as new section 14501. The language of the reenacted provision is identical to the original.

non-uniform state regulations of motor carriers which had caused "significant inefficiencies, increased costs, reduction of competition, inhibition of innovation and technology, and curtailed the expansion of markets. *Mendonca* at 152 F.3d 1187 (*citing* H.R. Conf. Rep. No. 103-677, at 86-88 (1994), 1994 U.S.C.C.A.N. 1715, 1758-60. Congress explained that the typical forms of state regulation that were of concern "include entry controls, tariff filing and price regulations, and types of commodities carried." *Id.* at 86-87, 1994 U.S.C.C.A.N. at 1758-59.

The section listing non-exempted areas is intended to "emphasize[ ] that State authority to regulate safety, financial fitness and insurance . . . is unchanged since State regulation in those areas is not a price, route or service, and thus, is unaffected." *Id.* at 85, 1994 U.S.C.C.A.N. at 1757.

b. Recent Supreme Court Cases on Preemption

In several recent cases, the Supreme Court has analyzed the scope of preemption clauses. In *Travelers Ins.*, the Court held that traditional state regulations having no more than an indirect effect on ERISA plans were not "related to" such plans within the meaning of the preemption clause. *Travelers, Inc.*, 514 U.S. at 662. The Court did, however, recognize that a state law might produce "acute, albeit indirect, economic effects" such that a state law might [sic] preempted. *Id.* at 668.

More recently, in *California Div. of Labor Standards Enforcement v. Dillingham Construction* 519 U.S. 316 (1997), a unanimous Court held that California's prevailing wage

law was not preempted by ERISA. The Court stated that a law 'relates to' an ERISA plan "if it [1] has a connection with or [2] reference to such a plan." *Id.* at 324. The state law at issue in *Dillingham* did not refer to ERISA and the state laws in the present case do not refer to the ICCTA. Thus, the issue is whether the state laws in the present case have a connection to the ICCTA such that preemption is required.

To determine whether a state law has the "forbidden connection", the Court in *Dillingham* looked to the objectives of the ERISA statute as a guide to the scope of the state law that Congress understood would survive, as well as to the nature of the effect of the state law on ERISA plans. While acknowledging that the prevailing wage law may increase costs for ERISA plans, the court held that it "could not hold preempted a state law in an area of traditional state regulation based on so tenuous a relation." *Id.* at 334. The Court stated that preemption of traditional state-regulated areas such as wages where ERISA has not directly spoken to the subject would be "unsettling." *Id.*

c. Ninth Circuit Law

Applying the approach laid out by the Supreme Court, the Ninth Circuit recently held that the FAAA did not preempt California's prevailing wage law. *Mendonca* 152 F.3d 1184 (9th Cir. 1998). While it was argued that the state law increased prices by 25%, caused companies to utilize independent owner-operators, and compelled companies to re-route and re-direct equipment to compensate for lost revenue, the court found that the state

law's effect on prices and services was no more than indirect, remote, and tenuous. *Id.* at 1189. The court held that the state law did not frustrate the purpose of deregulation by acutely interfering with the forces of competition. *Id.*

d. Preemption of State Laws in Present Case

Under the above analysis, any state or common law claim that conflicts with defendants' ability to comply with federal law or stands as an obstacle to the accomplishment of the purpose of the federal law is preempted. In addition, any state law that "relates to" the price, route, or service of a motor carrier is expressly preempted under the ICCTA.

The main purpose of the truth-in-leasing provisions of the ICCTA is to "ensure truth-in-leasing by fostering disclosure." *Tousely v. North American Van Lines, Inc.*, 752 F.2d 96, 101 (4th Cir. 1985). As stated above, the goal of the ICCTA itself is to deregulate the motor carrier industry to eliminate inefficiency and promote competition.

1. Implied Preemption

Defendants assert that because state law seeks to bar motor carriers from allocating the ultimate liability for insurance to owner-operators, which the leasing regulations allow, there is a conflict requiring preemption. Further, defendants argue that the state law requiring licensing as a condition to brokering insurance conflicts with the leasing regulations.

The leasing regulations mandate that in the event that an owner-operator is obligated to pay for insurance required to be maintained by the carrier, the contract must make that fact clear to the owner-operator. *See* 49 C.F.R. § 375.12 (j)(1) ("If the authorized carrier will make a charge back to the leasor for any of this insurance, the lease shall specify the amount."). The aim of the regulations is to compel disclosure of the contract terms between the owner-operator and the carriers, not to govern the terms for which the parties are permitted to bargain. Nothing in the federal regulations prevents a state from passing legislation that mandates a particular contract term with regard to the costs of insurance. Similarly, while separate licensing requirements in each state may impact carriers in some way, the brokering of insurance is not the focus of the federal law.

Finally, defendants have not demonstrated that state laws prohibiting misrepresentation, deceit, and similar activities are either in actual conflict with the leasing regulations or an obstacle to the accomplishment of the purpose of the regulations. *See Mendonca* at 1189. For these reasons, a finding of implied preemption is unwarranted.

ii. Express Preemption.

Defendants also argue that plaintiffs' state and common law claims are expressly preempted by the ICCTA's preemption provision. The provision precludes a state from enacting or enforcing any law that "relate[s] to a price, route, or service of any motor carrier." 49 U.S.C. § 21501 (c).

The effects of the state insurance, wage, and workers' compensation laws on defendants are similar to the incidental increase on costs caused by the prevailing wage law at issue in *Dillingham* and *Mendonca*, held insufficient to "relate to" prices by the Supreme Court and Ninth Circuit. Additionally, insurance and wage requirements are areas generally reserved to the states. *See Mendonca*; 49 U.S.C. § 14501 (c)(2).

Defendants have not shown that the state laws prohibiting misrepresentation, deceit, illegal conversion, or failure to pay the reasonable value of plaintiffs' services, or laws governing reporting and payment of plaintiffs' earnings, have a sufficient relation to a price, route, or service to require preemption under the ICCTA provision. Plaintiffs' claims are not expressly preempted.[3]

II. Private Cause of Action for Damages Under the ICCTA

The second issue briefed by the parties is whether the ICCTA provides for a private cause of action for damages. Plaintiffs claim that the statute provides for an action for damages. Defendants argue that actions for damages are only available to an enforce agency order or to challenge a charge that exceeds the applicable tariff rate, neither of which is involved here. Both parties agree that an action can be brought for injunctive relief.

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[3] Plaintiffs argue that the McCarran-Ferguson Act prohibits a finding that the insurance laws are preempted. As the Court finds no preemption on another basis, this argument need not be reached.

a. The Text of the Act

"The starting point in statutory interpretation is the language (of the statute) itself," *United States v. James*, 478 U.S.C. § 14704. Section 14704 (a)(1) authorizes civil actions to enforce an order of the Secretary or the Board or an action for injunctive relief. Section 14704 (c)(1) then specifically creates a cause of action for damages against a carrier for charges exceeding the applicable tariff rate. Defendants argue that Congress's authorization of these specific types of actions indicated that other causes of action for damages are not allowed under the Act.

Plaintiffs point to § 14704 (a)(2), which states that a "carrier or broker providing transportation or service subject to jurisdiction . . . is liable for damages sustained by a person as a result of an act or omission of that carrier or broker in violation of this part," as support for their assertion that they have a cause of action. However, nothing in this section authorizes a cause of action for damages in district court. The provision simply affirms carrier liability for damages, without specifying how an injured person may pursue those damages.

b. Federal Case law

This issue has not been addressed in the Ninth Circuit. A Missouri district court, looking at identical provision governing rail carriers, held that the governing board has exclusive jurisdiction to consider a private cause of action for damages, and that a district court can only hear such an action after the Board had issued an order. See *DeBruce Grain, Inc. v. Union Pacific Railroad Co.*, 983 F.Supp. 1280 (W.D. Mo. 1997).

The court in *DeBruce* put emphasis on the structure of the applicable statutes of limitations. The Act provides for a limitation period for civil actions to recover overcharges and for civil actions to enforce an order from the Board. *See* 49 U.S.C. §§ 11705, 14705. There is no provision governing the filing of a civil action for any other types of damages. If other actions for damages were allowed, plaintiffs would appear to have no limitations period, a result the *DeBruce* court dismissed as "absurd." *Id.* at 1284. This suggests Congress did not intend to permit civil actions for damages for violations of regulations.

Similarly, a Texas district court held that under the civil enforcement provision governing rail carriers "'a person may file suit in federal court only to enforce an order of the Board, to recover overcharges or to recover under a bill of lading." *City of Larado v. Texas Mexican Railway Co.*, 935 F.Supp. 895, 898 (S.D. Tex. 1996). The rail carrier provision is virtually identical to that governing motor carriers. *See* 49 U.S.C. §§ 11704, 14704.

c. Legislative History

The legislative history regarding the availability of a private cause of action for damages under the Act is ambiguous.

Plaintiffs rely heavily on statements in the House Report on the passage of the ICCTA. The report states that the "bill provides that private parties may bring actions in court to enforce the provisions of the Motor Carrier Act." House Report No. 104-311, p. 87-88. U.S.C.C.A.N., 799-800.

However, the same House Report then summarizes section 14704 as "provid[ing] that an injured person may bring a civil action to enforce an order of the Secretary or the Panel under this part. This section also provides that complaints brought to enforce the motor carrier leasing and lumping rules may also seek injunctive relief." *Id.* at 121, U.S.C.C.A.N., 833. The summary clearly contemplates the continued existence of agency orders on claims for damages, and makes no mention of bringing an action for damages without such an order.

d. Department of Transportation Order

In addition to the legislative history, plaintiffs place great emphasis on an order of the Federal Highway Administration ("FHWA"), within the Department of Transportation. In a June 10, 1998 order, the FHWA denied a petition for a declaratory order seeking a ruling that certain companies were violating the truth-in-leasing regulations. *See New Prime,* 63 FR 31827, *in* Federal Register Vol. 63, No. 111.

The FHWA stated its belief that the ICCTA provided for private enforcement of its provisions, allowing an injured party to seek damages against a motor carrier in federal court to redress violations of the truth-in-leasing regulations. Because such claims could be brought in federal court, the agency stated that it would not generally hear them.

The FHWA's reading of the ICCTA was directly contrary to that of the district court in that case, which had dismissed the suit for damages because it found it had no

jurisdiction. Ordinarily, courts are required to accord substantial deference to an administrative agency's interpretation of the statute that it is charged with administering. *See Chevron U.S.A., Inc. v. National Resources Defense Council, Inc.*, 467 U.S. 837 (1984). However, the disagreement here is not over an agency decision, but whether a federal court has jurisdiction to hear a particular claim. It is inappropriate for a federal court to expand its jurisdiction in anticipation of agency inaction. *See Central Arizona Water Conservation Dist. v. United States Environmental Protection Agency*, 990 F.2d 1531, 1540 (9th Cir. 1993) (stating that courts should not defer to an agency where the agency has not exercised its expertise).

The text of the ICCTA and the reasoning of the federal courts that have considered this issue lead to the conclusion that there is no private cause of action for damages arising from a violation of the truth-in-leasing regulations.

CONCLUSION

For the above reasons, the Court finds that plaintiffs' state and common law claims are not preempted. The Court also finds that there is no private cause of action under the ICCTA for damages without first obtaining an agency order.

DATED: February 23, 1999

/s/ Mariana R. Pfaelzer
Mariana R. Pfaelzer
United States District Judge